UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CITY SELECT AUTO SALES, INC., a New Jersey corporation, Individually and as the Representative of a class of similarly situated persons,

Plaintiffs,

vs.

CIVIL ACTION
NO. 11-2658 (JBS)

MOTION

DAVID RANDALL ASSOCIATES, INC. and RAYMOND MILEY, III,

Defendants.

UNITED STATES COURTHOUSE
ONE JOHN F. GERRY PLAZA
4TH AND COOPER STREETS
CAMDEN, NEW JERSEY 08101
FRIDAY, DECEMBER 14, 2012

B E F O R E: THE HONORABLE JEROME B. SIMANDLE
CHIEF JUDGE
UNITED STATES DISTRICT JUDGE

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DEPUTY CLERK: All rise.

THE COURT: Be seated, please.

This is the matter of City Select Auto Sales Incorporated vs. David Randall Associates, Inc., Civil No. 11-2658. Today's the return date for oral argument on a number of motions. There's a plaintiff's motion for class certification, there's a defendant's motion for default against the third-party defendants. Technically there's three motions from the plaintiff to cite additional authorities. The additional authorities are before the Court, they're being considered, and Mr. Fitzpatrick will have the opportunity to argue against them today or undermine the authorities.

And so let's begin with the motion for class certification. Mr. Lewis.

MR. LEWIS: Thank you, your Honor.

My name is the Tod Lewis and I'm here on behalf of Bock & Hatch on behalf of the plaintiff and the class, putative class in this case. I'm joined by Alan Milstein of the Sherman, Silverstein firm.

Your Honor, we seek certification of a class of 29,113 persons who received essentially the same document by fax, over 44,000 faxes, over -- on six separate days over about a six-week period in the period late March through about the middle of May 2006. This faxed document was an advertisement that was sent to plaintiff and other class members without

prior express invitation or permission. The defendant has not produced any contrary evidence in this case.

A class should be certified here because it meets all the requirements of Rule 23(a) and Rule 23(b)(3). We've also provided the Court with citations to numerous federal cases certifying TCPA classes involving primarily purchased lists of fax numbers and those involving Business To Business Solutions who defendant hired in this case. In this case the purchase list was procured from an outfit called Info U.S.A. Your Honor, numerosity is satisfied because there are 29,113 class members, a joinder is impractical.

Commonality is also satisfied because the same advertisement was sent on six days occurring over a six-week period to anonymous third party lists that was purchased from Info U.S.A., as I said before, which the defendant never even reviewed.

Typicality, your Honor, is met because the plaintiff's claims arise over the same course of conduct and the same advertisement.

Adequacy is met because there are no conflicting interests between the plaintiff and the class members. Also, the Third Circuit requires, as to counsel, that counsel be qualified, experienced, and generally able to conduct the case. Also, here again, the plaintiff has no antagonistic interest with the class. We are qualified, experienced, and

able to do this litigation as we've proved across the nation.

I'd like to take a little bit of time on the adequacy section because the defendants have spent the majority of their time in this case taking issue with our adequacy.

Defendants --

THE COURT: Well, before you do, a lot of the criticism seems to be directed at Anderson & Wanca. What role would they play in this case if the class were certified and your firm were the class counsel?

MR. LEWIS: Well, they would serve as co-counsel in the case, they would serve whatever role the Court desired.

THE COURT: What makes them co-counsel? They're not members of the Bar of this Court nor have they been admitted *pro hac vice*.

MR. LEWIS: We could have them admitted *pro hac vice* if the Court desires.

THE COURT: Well, it's a little late for that. But would your firm be able to carry the ball together with Mr. Milstein's firm as class counsel?

MR. LEWIS: Absolutely, your Honor. Absolutely. We've shown that in case after case across the country.

THE COURT: Are there ethically troubling aspects of Anderson & Wanca's behavior in the past? Or let me ask a different question. If their role is not to be as class counsel and if their attorneys are not to be admitted

pro hac vice going forward, is there any reason to examine Anderson & Wanca's ethics in other cases?

MR. LEWIS: I don't believe so, your Honor. But we firmly believe that neither Ryan Kelly nor anyone with the law firm of Anderson & Wanca has done anything wrong or engaged in any misconduct, and I can get into the reasons with regard to that.

THE COURT: Well, it may not be necessary or it may. Let's switch subjects, and we may return to this in a moment after Mr. Fitzpatrick's argument. But what about the B2B hard drive? In a motion for class certification, it's not a mini trial, it's not the compression of the trial, but it's also not blind to the merits of the case. I think that the Supreme Court and the Third Circuit have been pretty clear in saying that the trial judge has a duty to peek at the merits to make sure that one is not certifying a class that just isn't going to go anywhere. On the other hand, this is not a motion for summary judgment, it's not time for plaintiffs to, quote, unquote, put up or shut up, that day could come later in the case, but a class certification motion shouldn't be confused with summary judgment either. But we're somewhere in between, mere reliance on the pleadings, on the one hand, and introducing sufficient admissible evidence to withstand summary judgment on the other. And this in between place probably requires me to look at the admissibility to the most

important piece of evidence, at least I think it is, in the case.

Would you agree with what I said so far?

MR. LEWIS: Absolutely, your Honor.

THE COURT: Is it admissible? Is it likely that it will be admissible?

MR. LEWIS: Absolutely, your Honor. And the defendant's cited the *In re: Hydrogen Peroxide* case, the plaintiffs in that case, their expert lacked any economic model or analysis to support a finding of commonality in that case. Here the situation is the exact opposite. The plaintiffs have produced an extremely detailed and exhaustive report of Robert Biggerstaff and the defendant has not offered the Court any rebuttal expert.

The defendant has also quoted the case of *Dreyer vs. Altchem*, well, in that case the plaintiffs produced three affidavits that were procedurally deficient and, quote, bereft of detail, unquote. That is not the case here. In this case we have produced the December 28, 2010, declaration of Caroline Abraham, which fully supports admissibility of all of the B2B computer data. Federal Rules of Evidence 901(a) only requires some evidence showing that the computer data is what the proponent claims. There's no evidence in the record that it's anything but what the proponent claims. The business records exception rule also comes into play, and Ms. Abraham's

declaration supports the view that it is admissible under the business records exception rule.

THE COURT: Now, you've made mention of computer data, are you talking about the printout that comes from a computer or are you talking about the hard drive that's been referenced?

MR. LEWIS: Well, the hard drive and the backup DVD's were analyzed by our expert Robert Biggerstaff, so it's really both, your Honor.

Also, Federal Rules Of Evidence 902(11) and (12), the Abraham declaration supports admissibility not just in the context of class certification, but also admissibility at trial. Abraham was the custodian of the records. Now, the defendant has taken issue with the chain of custody and argues that we haven't established chain of custody. But chain of custody only goes to the weight, not the admissibility of the B2B computer evidence. And the Court can consider basically anything it wishes here at the procedural class certification stage because the, as one of the cases that we quoted in our brief, the gatekeeper is keeping gate only for itself. So that's another.

But at any rate, the B2B business records are fully admissible, your Honor. They are authentic. There is nothing in this record to establish they've ever been tampered with or anything has ever been changed. They're contemporaneous

business records of Business To Business Solutions.

THE COURT: Would you have B2B witnesses available to you to lay the foundation for their admissibility at trial?

MR. LEWIS: We believe under Federal Rule of Evidence 902(11) and (12) that the declaration itself would serve as the basis for their admission at trial. But we could still take Ms. Abraham's deposition as well during the merits phase of the case post-certification.

THE COURT: Is she an available witness if you needed her? Or if the other side needed her, if the defendants wanted to take her dep?

MR. LEWIS: I would --

THE COURT: And I know you don't pay for her.

MR. LEWIS: -- constitute her as -- well, she has been third-partied in this case and she hasn't appeared. She is, quite frankly, toward us, your Honor, a hostile witness. So --

THE COURT: But is she within the subpoena power of the Court?

MR. LEWIS: I don't know. I don't know. She lives in Brooklyn, I don't know if that's close enough, we've never looked into that.

THE COURT: Or you could go to Brooklyn, if need be, and serve her out of the Eastern District of New York.

MR. LEWIS: Well, that's how all the allegations of

misconduct started, your Honor, was when we got a rule to show cause order in front of Judge Matsumoto who ordered Ms. Abraham to turn over all the B2B data, but that's kind of an aside right now. But, yes, we are familiar with taking her to court in the Eastern District of New York, we have before and she shows for depositions and she shows -- if she's within the Court's jurisdiction, we will do whatever means necessary, we will do to get her to comply with the rule of law on behalf of the class.

THE COURT: All right. And, of course, those problems can be thrashed out later, but she's not institutionalized or deceased?

MR. LEWIS: No, that is true, your Honor.

THE COURT: Okay. Is there anything else that you want to add?

MR. LEWIS: A couple things.

The defendant has taken issue and said commonality is not established because of the established business relationships exception to the TCPA and the invitation or permission, what's commonly known as the consent rule. The defendant's arguments with that regard are completely purely hypothetical, they provided no evidence to the Court. They've argued that one may have given implied consent by publishing one's fax number, that that might somehow be at issue here. That's incorrect, according to the FCC, there's no such thing

as implied consent by publishing one's fax number. It's not a green light to receive everybody's junk faxes that are being advertised and faxed across the nation. These faxes are sent anonymously to strangers to purchase third-party lists, as I said before. We've produced 500 pages, the names and addresses and phone numbers of all 29,113 businesses. The defendant hasn't come up with even a single name of an established business relationship.

The defendant has also --

THE COURT: Well, let's stay with that subject. If someone has an established business relationship or a prior business relationship with David Randall Associates, then they would not be members of this case, would they?

MR. LEWIS: They can be carved out. But there's also --

THE COURT: Shouldn't we fix the class definition then so that it does carve them out? Do you have a copy of the class definition?

MR. LEWIS: Yes, your Honor. We could, we could do that.

THE COURT: And also wouldn't it apply to only unsolicited faxes? And the word unsolicited doesn't appear in the definition.

MR. LEWIS: We could do that, your Honor.

THE COURT: No, but could the plaintiff live with the

definition that would start out reading "All persons with whom David Randall Associates did not have a prior business relationship who were successfully sent one or more unsolicited faxes during the period," et cetera?

MR. LEWIS: Yes, we can live with that. Many courts have gone in that direction.

THE COURT: Okay.

MR. LEWIS: Does your Honor wish to hear anything about this issue of Ryan Kelly being a material witness?

THE COURT: Well, doesn't that issue drop out if he's not an attorney in the case?

MR. LEWIS: Yes, it would.

THE COURT: If he is an attorney, then he could still be required to testify and be excluded as an attorney if need be.

MR. LEWIS: But our argument would be that anything that he would have any testimony regarding would relate to procedural class action matters and not to the actual merits of the case. If it relates to misconduct in some -- or alleged misconduct in some form or fashion that defendants and Ms. Abraham have alleged, then that now essentially would be the time for that, but at trial there's no substantive purpose for Mr. Kelly's testimony.

THE COURT: Well, there's going to be a period, even if this class is certified, for discovery. And in the

discovery the defendant would have the opportunity to explore whether this computer data is tainted in some way or whether there's some reason to argue against its admissibility. And if they believe that the evidence was corrupted in some way, they would have the opportunity to explore that in discovery and explore it with Mr. Miley if they deem it appropriate. What would prevent that?

MR. LEWIS: To date there has been no allegation of any corruption or tainting or certainly no evidence of corruption or tainting or anything of the sort. But, yeah, I see what you're saying.

THE COURT: Okay. I don't have any other questions at this time.

MR. LEWIS: Thank you, your Honor.

THE COURT: Thank you, Mr. Lewis.

Mr. Fitzpatrick?

MR. FITZPATRICK: Thank you, sir.

As I indicated in our response, we believe that there are very serious deficiencies in this application for class action certification and very serious record improprieties that indicate in particular that the proposed class counsel are unsuitable under the federal rules.

I'll start from what we now know is the beginning as a result of the reply memorandum that plaintiff's counsel filed to this motion to dismiss -- I'm sorry, motion for class

certification.

As I indicated in my opposition to this motion, we believe that the genesis of this case was the same genesis as the prior iteration of this case, the *David Winter's* state court complaint that was also nominated a putative class action but was never prosecuted as such. In that case we learned through discovery that the named plaintiff had not actually been the source of the fax, the alleged fax that was attached to the complaint in that case or the claim of receipt of the alleged fax that the named plaintiff made in that complaint. It was actually an attorney named Ryan Kelly of the Anderson & Wanca firm who not only unethically solicited that named plaintiff, because Mr. Kelly was not a member of the Bar of New Jersey and had no right to solicit a non-client with the letter that he sent anyway, and the solicitation letter contained a misleading inference that there already was the existence of a class.

In this case we now know that the same thing occurred. Mr. Wanca, this is Exhibit F to the plaintiff's reply memorandum in this -- to this motion for class certification, that contains a letter dated December 5, 2009, from Brian J. Wanca of the Anderson & Wanca Illinois law firm to City Select Auto Sales.

Would your Honor like a copy? I can give you mine to reference if it's easier.

(Hands up document)

THE COURT: Thank you.

MR. FITZPATRICK: I know what it says, it says the exact same thing, that Ryan Kelly of his law firm formerly said to the *David Winter's* named plaintiff in order to get the *Winter's* plaintiff to sign up for the prior iteration of this a lawsuit. In that letter Mr. Wanca -- again, on the face of that letter, that's an unethical solicitation under New Jersey Rules of Professional Conduct. Mr. Wanca is not licensed to practice in New Jersey, but he sent a solicitation letter to a New Jersey corporation. In that solicitation letter he made the same misleading claim that Mr. Kelly previously made to the *David Winter's* entity in order to get them to sign up implying that there was an existing class and implying -- telling City Select that it had received a, quote, unquote, junk fax and that they may not even remember having received it but they could still be a plaintiff in this case and be entitled to receive money. Those are two definitively clearly misleading statements that have already been found to violate the ethical rules in other states.

In the *Creative Montessori* case that I cited in our brief, the court -- the Seventh Circuit remanded the district court's initial finding of suitability of class counsel and that finding was based on two points. The first point, the district court found that the means by which Anderson & Wanca

obtained the subject hard drive were illegitimate in that they had promised Caroline Abraham something that they would not further disclose to third parties and they did so. And, secondly, that the statement -- the misleading statement in an identical solicitation letter that there was an existing class constituted a *prima facie* ethical violation. The district court so found, but nonetheless said the class representative, the attorneys, it would not preclude them from representing the class. But the district court made that finding and referred them for disciplinary action to the Bar. That's the same factual circumstance that applies here. Now, ultimately that case on remand, the district court found that Caroline Abraham had not been sufficiently duped on the first point but never reversed the second point.

And in this case I'm just pointing out initially that this Court is starting out with *prima facie* evidence of three ethical violations on the part of an attorney who's not even in this case now but whom Mr. Lewis stood here and told your Honor that he's co-counsel. He is in fact, as I told -- as I indicated in my brief, this firm has in fact been behind this litigation to date, is still behind the litigation, is inevitably intertwined with it and cannot, in our view, this case can't proceed with counsel having any involvement whatsoever with Anderson & Wanca as they have and as they have indicated in their -- at every phase of the way.

I pointed out in my brief that there's quite untoward and unexplained representations that have been made by all of these attorneys in filings that they've made. In particular, the fact that Mr. Bock's name appears on this complaint, Mr. Wanca's name appears on this complaint. Mr. Milstein has previously represented that they were of counsel to his firm in the prior case. No of counsel relationship is shown in any letterhead or anything else, and we know they're not counsel in New Jersey.

A, number one --

THE COURT: Well, if Anderson & Wanca were kept out of this case, does that cure the issues that you're raising, including the issue of the availability of one of their attorneys as a witness?

MR. FITZPATRICK: I don't think so. And I think both -- I think Wanca and Kelly are both material witnesses in this case because there's going to be a threshold inquiry as to how did this case start. We know -- we now know that Mr. Wanca in an unethical solicitation started this case. We know something else --

THE COURT: Let's assume that that's true, and let's assume that the issue should be pursued about whether the case had an unethical solicitation at its start, why would that be laid at the feet of the attorneys who would be in the case if Anderson & Wanca are not going to be attorneys in the case?

Anderson & Wanca want to be attorneys in the case, I can say yes or no to that. If I say no because of all of these issues that would seem to involve their firm, why should I not permit someone else to be counsel of record if it's, you know, a certifiable class?

MR. FITZPATRICK: Because I think, as you said, let them be counsel of record, would not reflect the reality that Mr. Lewis just indicated to your Honor. They're co-counsel, they have been involved in this case and the prior case in particular in all of the tainted, what we contend are tainted aspects of the case. They have been involved in this litigation without disclosure to this Court up to this point and there's no real -- you can't build a Chinese firewall in this case, these firms obviously work together all throughout the country. The Court can take judicial notice of the many citations that were made in particular by the Seventh Circuit in the *Creative Montessori* case.

I believe that there's actually impropriety that Mr. Milstein knew or should have known about, that Mr. Lewis knew or should have had known about. And I believe that going beyond that, the appearance of impropriety, as I indicated in my brief, is such in this case that the Court cannot properly allow them to go forward and say, well, you'll just be -- you will just be, quote, counsel of record and Anderson & Wanca will not remain in this case.

And I underline that by pointing out an extraordinary facet of this motion for certification. Mr. Milstein filed a motion for certification, he was the only, quote, unquote, counsel of record. He filed the motion for certification in which he asserted not that he was competent counsel to handle this case but that Mr. Wanca and Mr. Bock were competent counsel. He went to the extraordinary lengths of submitting their CV's, and he said that the Court should be assured that they will properly represent the plaintiffs in this case when they were not in this case and when he knew or should have known by his own document, Exhibit F, that Brian Wanca could never be in this case.

We think it's not just -- it's record impropriety and it's rampant appearance of impropriety so strong that it could not be overcome by any order stating that just Mr. Bock's firm and Mr. Milstein's firm should be counsel of record. And again, in responding to your Honor, your Honor's question, Mr. Lewis said we have done these cases all over the country, we are appropriate counsel, we're good counsel, he's talking about not Mr. Milstein and not himself, because, and this is no slur to Mr. Lewis, but, as I indicated in my opposition to his *pro hac vice* motion, there's not one indication that he has had class action experience sufficient to carry this case. The case is clearly going to be carried by people in the background that we know are subject to be deposed in the case

and that we already know have serious ethical problems. There's no doubt now, it's record evidence before the Court.

THE COURT: Well, how much experience should be required to go forward with a class action of this type where the stakes to any individual member of the class are fairly low and where the liability is shown fairly easily if it's to be shown at all? But it's not something like medical malpractice or antitrust or something more sophisticated. It's kind of a light switch case in terms of liability, isn't it? It's either on or off depending on whether someone received an unsolicited fax.

MR. FITZPATRICK: I think the minimum is more than none and we do not have that in this case. We have none on the part of Mr. Lewis and we have a demonstrably deficient showing on Mr. Milstein's part in the prior iteration of this case. And while it may indeed be the case that it's a light switch case, as your Honor puts it --

THE COURT: Well, and I don't use those words --

MR. FITZPATRICK: I know. I know what you're saying, I'm not --

THE COURT: -- I was being rhetorical.

MR. FITZPATRICK: I totally understand that. And, be that as it may, there are still significant legal issues and legal problems that the experience that the federal rule requires, that rule is put in there so that counsel can handle

things that may come up that they're not experienced about. And we already know that Mr. Milstein in the underlying case, he did not identify a single class member, he never filed for class certification, and he ultimately let the case go for an agreed statutory payment of $1,500 for the only named plaintiff.

Now, all the other alleged victims, recipients of these alleged unwanted faxes in that case are the same as the ones in this case. That case -- that litigation lasted three years. And, during the course of that litigation, the statute of limitations ran on all of their claims. Now, as your Honor's found in this case, the statute was tolled by virtue of the *American Pipe Holding*, the statute was tolled as to those people who were not identified. So they didn't lose any legal rights as a result of Mr. Milstein's, whatever you want to call it, oversight, tactical maneuver, whatever you want to call it, handling of the case, but they could have. So there are significant legal matters that require some experience. And we do know, as a matter of record, the only counsel who are counsel of record in this case do not have any demonstrable class action experience, or in the case of Mr. Milstein demonstrably -- in our view have not represented the putative members of that class as an experienced class attorney would have done.

So my answer to that question is more experience than

the record experience before your Honor indicates.

THE COURT: All right. If we turn away from adequacy of counsel -- or do you have anything further to say about adequacy?

MR. FITZPATRICK: Can I just see my notes for a second?

THE COURT: Sure.

MR. FITZPATRICK: Just one other thing about that, about the appearance of impropriety, which I briefed and I think is significant.

But there's one other thing that we know from this record. As I have argued, this case must have come about the same way the last case came about. No one from City Select has made one word of attestation in support of anything that your Honor has heard to date or anything of record in this case, nobody from City Select. Everything you're hearing comes from counsel. All the factual assertions have been made by counsel. In fact, counsel are the real parties in interest here. And I have argued, and I will argue again, that we already have record evidence to show that these attorneys were people acting in concert with them and on their behalf. Actually manufactured the fax that's attached to the complaint in this case just as it was learned that they manufactured it in the last case, that Mr. Kelly manufactured it.

If your Honor references the subject fax in the

plaintiff's class action complaint, it facially indicates a very suspect deficiency, there's no fax header at the top of this fax. All fax machines print fax headers. There's no sent. There's no received. There's no anything. They all print fax headers by default. Whether the sender's information is accurate or not, they all print fax headers. This was created the same way the other was created, I guarantee it's going to turn out that, and I submit the record evidence shows at this point very clearly that this was made the same way. This was printed by somebody -- this was not the fax that City Select ever received. This was printed by someone unknown, unidentified, from information that has never been specified in this case. And, quote, unquote, if there is really evidence of that, the Court doesn't have it in this case. And that's what I would like to address in my next --

THE COURT: Well, the complaint didn't specify that that was the fax received by City Select in so many words, did it? I thought it specified this is a copy of the fax that was sent in these mass faxings.

MR. FITZPATRICK: And that assertion has to be made by the named plaintiff.

THE COURT: Well, the plaintiff wouldn't know what was sent.

MR. FITZPATRICK: Sure he would. It's the plaintiff that has the complaint. It's the plaintiff that says I

received this and I didn't want it, it was unwanted, unsolicited and I had no prior business relationship, that's what the statute requires. In fact, this is entirely concocted by attorneys with no possibility of the plaintiff ever attesting that it received this fax.

THE COURT: But receipt doesn't seem to be a necessary element to the statute, does it? I thought that the statute addressed those that were sent unsolicited to ones that didn't have a prior relationship. It's the sending, in other words, that completes the picture, it is not receipt.

MR. FITZPATRICK: No, it's not, that is a misconstruction that the plaintiffs acidulously argue everywhere they can, but the courts have not accepted that. Because it's sending -- it is manifestly not unlawful to send a fax, it's only unlawful to send a fax if there's no prior business relationship, it's unwanted, and it doesn't contain the statutory disclosure. So the fact that --

Plaintiff's counsel also like to mistakenly argue that this is a strict liability statute and meaning there's no defense. Sure there's defense, there's those three defenses that I just specified. Those defenses require the plaintiff to make a showing that it actually received the faxes because he's going to have to say it was unwanted, there was no prior business relationship. Those are the elements of the cause of action and they necessarily require a showing that the fax was

received.

And my argument is that the complaint is very artfully drawn in order to avoid the consequences of this very issue. But my argument is that there is no legitimate complaint if the plaintiff cannot make the showing required by the statute. And that if even the named plaintiff cannot attest that it received this and is not aware if it received it, then it's complete perversion of the statute to permit this class complaint to go forward. Necessarily the plaintiff's complaint, City Select's complaint that it allowed its name to become attached to and the fax that it allowed in there and the claims in there necessarily constitute an attestation that it received this fax. And if that's not the case, then my view is it's an unconstitutional application of this statute under these circumstances.

THE COURT: Has the deposition of the proposed class representative been taken yet?

MR. FITZPATRICK: No, sir.

THE COURT: Wouldn't that have resolved this issue about whether they received it or how they were solicited and all that?

MR. FITZPATRICK: It will resolve the issue, certainly.

THE COURT: But if it hasn't been done by now, am I to speculate there's going to be some problem in the future?

MR. FITZPATRICK: This is the first thing that we -- the first element of discovery that we did in the underlying case when we were able to do it. And, as soon as we did that, as soon as it was revealed that they didn't create this, they just received the solicitation, they said, yeah, it's free money, they're being promised free money.

THE COURT: But what if the class representative says I remember receiving this, I didn't save a copy, it went in the trash, isn't that quite feasible?

MR. FITZPATRICK: It's quite feasible, especially if that's -- six years later, he knows what to say. It's quite feasible and that would resolve it. But I --

THE COURT: But your client seems to have no suggestion that a fax like this wasn't sent or this list was bogus and that this City Select couldn't have gotten it.

MR. FITZPATRICK: I'm sorry, I didn't get that.

THE COURT: Your client -- City Select says that it should be the plaintiff, that it should be the class representation and that it has a good cause of action. If it were doubtful that this fax were sent to City Select or if it were doubtful that a fax of this type were sent to anybody, you said it's doctored or it's manufactured, isn't your client in a great position to tell me that today and say we have a record of what was sent on behalf of our clients and this isn't there, no such thing was sent, or this list is totally

bogus, there's not 29,000 recipients?

MR. FITZPATRICK: The factual background of this case is my client has no idea. My client, from the record evidence, hired what it believed to be a legitimate advertising company to make a legitimate advertising campaign with what they had every reason and expectation to believe was lawful information. And we still don't know that that wasn't true, there's not one shred of evidence in this case that indicates that wasn't true.

THE COURT: Well, for instance, was there billing? Did your client pay bills to B2B saying you're being billed for X thousands of faxes? I think I saw that in the record.

MR. FITZPATRICK: Yes, they did hire B2B, but they did not know that B2B was allegedly carrying out the campaign that it solicited in an unlawful manner.

THE COURT: That may speak to the third-party claim that your client has against it. But in terms of the integrity of this fax, you used very strong language, you said it was manufactured by the attorneys --

MR. FITZPATRICK: It was.

THE COURT: -- because it lacked a header.

MR. FITZPATRICK: It didn't come from City Select, I can assure you of that. This did not come from City Select. This came from somebody using something, whether it was the hard drive, whether it was in DVD's that they've talked about,

something. This came wholesale from somebody other than City Select. They were told, just as Brian Kelly told the prior named plaintiff, they were told you received these faxes. Kelly sent them to faxes and I'm certain that's what we're going to find happened in this case.

THE COURT: If we do, wouldn't the case not be subject to a good summary judgment motion?

MR. FITZPATRICK: Yes.

THE COURT: I mean, if your interpretation of the statute is correct and they're not able to prove that they received it?

MR. FITZPATRICK: But at this point it's the plaintiff's burden to show by a preponderance of admissible evidence that the Court has a good faith basis for certifying the class. This is not an inconsequential order that would result especially based upon the allegations of the number of faxes involved in this.

So I don't mean to beat any point that your Honor has already thought about, but if I could just address my other points I'd like to strongly bring to your attention --

THE COURT: Sure.

MR. FITZPATRICK: -- before I get off the appearance of impropriety.

Mr. Wanca also, as I pointed out to the Court, as a matter of record, sent Caroline Abraham a $5,000 check to her

attorney, which her attorney himself viewed as an attempted payoff involving the subject declaration, which she subsequently gave, which counsel for the plaintiff has contended is the evidence that will permit your Honor to grant this motion for class certification. It's a huge appearance of impropriety. It can't be glossed over. It can't be minimized. The very recipient sent it back and said he resented it and he said he considered it to be a payoff. And as I pointed out, no experienced attorney could reasonably believe that sending $5,000 to that woman under these circumstances, which was not for -- not accompanied by a subpoena and she was a fact witness, no experienced attorney could believe that that was not improper. All of these acts occurred and are known to Mr. Milstein and Mr. Lewis and we submit that they create, aside from the direct impropriety, the appearance of impropriety that's so strong that it prohibits the Court from making the finding that it must make as to that aspect of Rule 23.

There's one other, as to adequacy of counsel, one other point that I wanted to raise is that in the *Winter's* litigation Mr. Milstein moved for *pro hac vice* admission of Ryan Kelly when he clearly knew that Ryan Kelly was now subject to be deposed as a material witness in that case.

THE COURT: Your argument, though, assumes that that would put Mr. Kelly automatically off limits as a witness.

MR. FITZPATRICK: No, what I'm arguing now is to adequacy of counsel, Mr. Milstein is now only counsel of record.

THE COURT: No, but you're accusing Mr. Milstein of having the tactic in mind that if he would just sign up Mr. Kelly as co-counsel, that no one would have to worry about Mr. Kelly giving a deposition, is that right?

MR. FITZPATRICK: Yes, sir. Even if it wasn't a tactic, he knew at that point, he must have known that Ryan Kelly could never be admitted in this case because he was subject to be deposed, he was a material witness. So if he didn't understand Rule 3.7, he should have. He's not adequate counsel if he did not understand. And I really -- I don't need to go into his motives or explore his motives, but I'm just saying that it's an appearance of impropriety, it's an appearance of inadequate understanding at a minimum by the attorney who proposes to be class counsel in this case. I think there's, to go back to your Honor's question of Mr. Lewis, I just think the interconnections, the record interconnections among these attorneys are so close and so admittedly close that it creates a fatal appearance of impropriety.

There's an additional problem with the proposed representation by the class attorneys, which I've noted in my brief. They previously assisted Caroline Abraham against the

interests of the putative class members, their putative clients in defeating a motion to add her as a third-party defendant in a class case. They made the same motion on this record in this case. We served Caroline Abraham and her son as third-party defendants and Mr. Milstein, who does not represent them and could not possibly represent them, filed a motion opposing it. Under no circumstances can that be considered a legitimate motion. They are acting against the interests of their own putative class. This woman has -- by all accounts was responsible for masterminding this whole fax advertising solicitation and everything that resulted from it, the only reason they're trying to keep her out is because for the same record reasons that we showed, the communications between her and Mr. Kelly, the promises, the promises of keeping them out of the case if she would comply with their wishes and say what they wanted, that's an appearance of impropriety. And that leads to the next argument.

THE COURT: But would it be good to get to the bottom of that before there is class certification?

MR. FITZPATRICK: Yes.

THE COURT: And there was a period of class certification discovery in this case, wasn't there?

MR. FITZPATRICK: No, sir.

THE COURT: So the motion was filed and -- let me check the docket.

MR. FITZPATRICK: We just have --

THE COURT: I'm just wondering, I'm not holding this, but is this motion premature? Should Caroline Abraham be deposed to get to the bottom of this? Should the class representative be deposed to get to the bottom of the solicitation and whether he's going to be able to say that he actually received this fax? And then we could start over or it might at that point, if everything is hunky-dory, even be a consent or stipulation to class certification. But if not, then it could be litigated based on a fuller record.

MR. FITZPATRICK: Yes, sir. I believe that is required in the event that your Honor does not find that what the plaintiff's counsel has presented to you is deficient as a matter of law. If your Honor -- in our view if your Honor is inclined to do anything other than the deny the motion for class certification, discovery has to be taken, and so it should be suspended and discovery should be taken on these issues. We just feel that -- they've presented you with a motion, we've responded, and we don't think on their motion, on the record of it it can ever go forward. We don't think this further discovery is required to determine that. But if your Honor feels otherwise, certainly discovery is absolutely required.

But they came forward to you and said there's a preponderance of evidence in this case, record evidence that

requires you to grant class certification. And what do they say it is? Not any affidavit from anybody, because there's none before you. A certification by Caroline Abraham that is facially deficient, utterly suspect, and under no one's wildest dreams could that declaration be admissible evidence at trial. That is not a B2B business record. The record evidence shows that it is a litigation prop that was drafted by Anderson & Wanca attorneys, sent to her and she was told to sign it. She then, as I detailed in my brief, she asked for a payment of $1,250 for her services. Then she asked Mr. Kelly, well, which one of those devices contains the information that you're asking me about in this certification? And Kelly wrote her back and told her that's not a B2B business record. Never would be admissible. It was concocted clearly by Mr. Kelly and Anderson & Wanca attorneys. So on its face that can't constitute admissible evidence for your Honor.

The only other piece that they say constitutes admissible evidence is the, quote, unquote, expert report of Mr. Biggerstaff. Mr. Biggerstaff's report on its face says that it was derived from information given to him by Ryan Kelly. Not from any examination of the subject hard drive, information from Ryan Kelly. No one knows what that information is. It's not a matter of record in this case. There's no chain of custody information. It's deficient as a matter of law. The two pillars on which they rest this motion

cannot possibly constitute the preponderance of evidence required to make a Rule 23 decision.

And I want to point out something else about Mr. Biggerstaff's report. In their reply memo they attached another letter from Mr. Biggerstaff in which he says that he has gone beyond his 2009 report and identified actual recipients of these alleged faxes, and he says that that's attached to his report as an exhibit and counsel has so represented in their motion and in their arguments. In fact no such attachment is contained in Mr. Biggerstaff's supplemental letter and no such attachment was filed with the Court. His report is admittedly not based on any examination or review of the subject hard drive. It gives the Court no certainty or even idea where the information came from because Ryan Kelly is not before this Court. And, as you heard Mr. Lewis state in response to your Honor's questions, they're trying to keep him out of the case, anyway, but he's a material witness. He clearly was in possession of the subject hard drive at the time that Caroline Abraham was asked to sign the declaration that he and/or other Anderson & Wanca attorneys gave her. This case can't go forward without an elemental chain of custody proof especially because, as your Honor knows, the subject fax in this case and the earlier case didn't come from the alleged recipient.

I made other arguments as to -- I just want to point

out that under any circumstances as well what has been called the expert report by Mr. Biggerstaff could never qualify as such under the rules of civil procedure. There's not one statement made in that report to a reasonable degree of scientific certainty, not one.

THE COURT: Well, I didn't think it was propounded as an expert report for purposes of trial, again that opportunity will come later if the case survives, but that it suggests that the plaintiffs will be able to prove the contents of the computer data when the time comes. So that if there's any question about the plaintiff's sources of information or ability to prove what was sent out that, during the course of the litigation, the plaintiffs will be able to prove it even if they can't prove it based upon the four corners of that report. I don't think that it's furnished as an expert report, it's furnished as information that supports or tries to support the motion, the class certification motion. Again, it's not a summary judgment motion in which they'd be required to come forward with admissible evidence.

MR. FITZPATRICK: Well, they're required to come forward with evidence, reliable evidence upon which this Court could make a factual determination that this putative class actually exists, and I merely point out in response there's no factual foundation for that. And, as well, this is their expert report, this was propounded as their expert report in

the prior case and it is not based on anything other than, here's the foundation, here's the foundation for that report. Ryan Kelly. Here's the foundation for Caroline Abraham's affidavit. Ryan Kelly. Where's the hard drive? Where's the underlying facts? Where's the affidavit? Why don't we have an affidavit of Ryan Kelly, he's clearly the party in interest. You're missing -- there's a complete absence of even a veneer of factual evidence sufficient to go forward. By plaintiff's counsel, through dressing that up as an expert report and saying we believe that we'll be able to show that, yes, that's a legal argument made by plaintiff's counsel who have every interest in making that legal argument, but it's not a factual attestation, it's not an affidavit.

THE COURT: Well, is there something in Rule 23 that required them to submit an affidavit? There are plenty of cases that make reference to affidavits being received, but I'm not aware of any that rejected a class certification motion simply for lack of an affidavit.

MR. FITZPATRICK: No, I'm not saying that as a general rule. I'm just saying that under these circumstances, which are very unique, we don't have a real plaintiff here, we don't have a real complaining witness. In the ordinary course if someone brings any motion in front of your Honor that represents facts not of record, it has to be accompanied by some type of verification, an attorney affidavit, a party

affidavit. There are factual representations that have been made very, very, very loosely by counsel for the plaintiffs in the motions that have been filed -- in all the matters that have been filed of record in this case so far that aren't supported and in many cases can't be supported by anyone who actually knows the facts. So all I'm suggesting is that not that Rule 23 requires that, but Rule 23 requires the Court to make specific findings as to each of the elements based upon reliable admissible evidence, and what you've been presented is on its face not reliable, highly suspect, and not admissible.

So our argument is there's a complete deficiency of the required showing in order to obtain the requested motion for class action certification and the proper response is therefore to deny it, not to try to give them every next chance they can but to deny it. They had not only the year that this case has been going on but three years prior to do this and this is what they decided to present to your Honor today and they contend that it's sufficient. We contend that it's not and that it should be dismissed on that basis.

The other thing I want to point out is, your Honor yourself raised this in questions to Mr. Lewis, and that is the definition, the proposed definition of the class. That's not a proper definition of the class as my brief indicates. It does require the additional elements that your Honor

suggested. And it requires one more, it requires the concept of -- the language, the proposed language is to any person who was sent, the proper language is to any person who received that fax. It is not a proper statement of the proposed class to state was sent, received is proper, and the *Local Baking* case that's cited in my brief indicates that. And in that case -- I also note that that was -- Mr. Bock was counsel of record for the plaintiff, putative class in that case and made quite a different requested class action definition. So, as written, it doesn't comport with the statutory elements, it would necessarily put the cart before the horse and preclude statutory defenses.

Lastly, I need to point out to the Court that the Third Circuit has an additional required review as to this particular statute, the TCPA, which was indicated in a recent holding in the case of *Landsman & Funk vs. Skinder-Strauss Associates* last April 2012 U.S. App. LEXIS 11946, in that case the court -- and I have copies for the Court, as well.

May I?

THE COURT: Yes. Thank you.

(Hands up document)

MR. FITZPATRICK: In that Third Circuit case the court remanded to the district court, it was a TCPA case, and said -- well, the first issue is *Mims* -- the Supreme Court case of *Mims vs. Arrow Financial* decided the jurisdictional

question of whether federal courts have jurisdiction over these putative cases in the first place by saying federal and state court have concurrent jurisdiction. But the Third Circuit said there's another required element of the analysis and remanded in that case for the court to do it. It said "These consolidated cases are hereby remanded to the district court for resolution of the effect of Section 227(b)(3) if otherwise permitted by laws or rules of court of a state. Language has on such federal TCPA actions, i.e., whether it subjects such actions to state law limitations that would apply to similar suites filed in state court and, if so, which ones. The district court should reconsider the issue in light of *Mims* and *Shady Grove Orthopedic Associates*." And I'll eliminate the cite.

That Third Circuit is there saying that in these TCPA cases, as to the question of, that we're now presented with here today, is it appropriate for class action, you have to look to the underlying state law. That analysis requires the Court to deny the motion for class action certification because New Jersey has directly held that class action treatment of TCPA cases is not warranted and not permitted under New Jersey law. So under the required analysis that the Third Circuit, as specified in that case, this case could never pass muster for class action treatment, anyway.

Denial of the motion for class action will not work any

substantive harm on any putative plaintiff. I made that point in my brief and made the citations. This Court has already ruled that the statute of limitations is tolled as to any of those putative plaintiffs cases. And, as the New Jersey court in *Local Baking* specifically held, the TCPA is not a superior vehicle for the resolution of these claims. In fact, the putative plaintiffs would all end up in a much better position by going to small claims court and filing their claims on their own than they would by allowing them to be handled on a class certification basis. So denial of the motion would not work any substantive harm to any member of this putative class.

THE COURT: How would it be superior to 29,000 superior court cases rather than one class action?

MR. FITZPATRICK: Because as the courts pointed out in that case and others cited in my brief, the determination of the membership in this putative class necessarily involves an individualized inquiry that is exactly the same inquiry that would be required on the merits. Did you receive a fax? Was it unwanted? Did you have a prior business relationship with the sender? Did you voluntarily make your information publicly available on the Internet, through a directory through which this number was obtained? The courts have reiterated that that individualized analysis is required at the class certification stage, and there's no superiority

whatsoever in doing that in a class action setting than in an individualized setting.

THE COURT: But couldn't class members in a certified class return a questionnaire that would make them either eligible or ineligible to participate in any recovery?

MR. FITZPATRICK: Could they respond by means of a certified rather than under oath? I don't --

THE COURT: No, there are some questions that someone would have to answer in order to actually be a member of this class, they would have to have had no prior business relationship, they would have to have had an unsolicited exchange here, and they could be asked those questions as part of the class action. That there may be distinctions between individuals that turn on the answers to a couple simple questions, I'm not sure that defeats the superiority when the numbers are so large otherwise. The prospect that people are actually going to go into municipal court is nil, isn't it?

MR. FITZPATRICK: Not according to what the legislature thought when they created this statute. As many of the courts -- and many of the courts and the New Jersey courts in particular have held that it was created to be a superior remedy with a relatively low legal threshold, i.e., small claims, and relatively high statutory penalty for what the courts have found is a very slight nuisance. So for a slight nuisance you can get $500 by walking in on your own,

you can walk out with the judgment on the same day. And they have found it -- I wouldn't exclude the possibility of something like, your Honor, a device in a class action case, many such devices are used in various cases and, you know, I'm certain something could be fashioned in this case, but I agree with the courts that have stated and concluded that this is not a superior mechanism for adjudication of these claims.

We really appreciate your Honor's attention.

THE COURT: Well, a couple more questions.

MR. FITZPATRICK: Sure.

THE COURT: Is it not necessary to the parties then to brief New Jersey law? Is that something that the Third Circuit *en* banc has, you know, required in the *Landsman & Funk* case?

MR. FITZPATRICK: I think I briefed enough of it, that's what's out there, that's the requirement. It's our circuit. It's a one paragraph statement, it's not subject to -- it's not ambivalent. I don't know that there would be anything else. They just said that in light of *Mims*, under this TCPA, you're required to look to state law. And state law, that's a definitive statement of state law in our view. But if your Honor wishes to get supplemental briefs, we'll be happy to do it.

THE COURT: Well, what is a state court case that says a class action can be maintained under the TCPA?

MR. FITZPATRICK: *Local Baking*, it's in my brief.

THE COURT: Okay. What's the name of it again?

MR. FITZPATRICK: I'll give it to you. *Local Baking Products, Inc. vs. Kosher Bagel Munch, Inc.*, 2011 New Jersey Super. LEXIS 143.

THE COURT: I'm familiar with that. That's an unpublished case, isn't it, or non-precedential case?

MR. FITZPATRICK: No, sir, I don't think so. They cited non-precedential cases that were therein. I may be wrong but I don't think so. This was the case that -- but again, we'll be happy to brief that issue if your Honor wishes.

THE COURT: All right. We'll get back to that then in a minute.

Okay. Let me turn back to Mr. Lewis.

Thank you, Mr. Fitzpatrick.

MR. FITZPATRICK: Thank you.

MR. LEWIS: I'll start right there, your Honor. *Mims* couldn't be more clear that federal law controls the federal TCPA. And the *Landsman vs. Funk* [sic] case, 640 F.3d 72, specifically says that "although individual actions under TCPA may be easier to bring in small claims court than other types of cases, that does not necessarily undermine the greater efficiency of adjudicating disputes involving 10,000 faxes in a single class action. Indeed, as plaintiffs point out, we

have little reason to believe that individual actions are automatically sufficient, plaintiffs can still face protected litigation when they sue individually." That was the Third Circuit's statement on the issue of superiority.

I've got quite a few points in rebuttal, your Honor. The very -- when defense counsel started out, he pointed to Exhibit F to the reply brief. It was not Exhibit F to the reply brief, the marketing letter that Anderson & Wanca used, it was actually Exhibit F to Professor Richard Painter's opinion that we have submitted in this case. And it is Professor Painter's opinion that the marketing letter that was sent by Anderson & Wanca was not -- did not violate the professional Rules of Professional Conduct.

Mr. Fitzpatrick said that all these courts have found that the marketing letter is deceptive, that's completely untrue. Judge Gettleman didn't like the letter that was submitted in *Creative vs. Ashford*, but the letter in this case is significantly different than the letter than the letter in the *Creative vs. Ashford* case. In this case the letter states that "During our investigation, we have determined that you are likely to be a class member in one or more of the cases we are pursuing." It specifically uses the words "solicitation letter" on the bottom. The *Creative Montessori* letter said "During our investigation, we have determined that you are likely to be a member of the class." That language is much

different. There's no evidence in this case that any of the 29,113 persons that are in the putative class were deceived in any possible way by any marketing letter.

Mr. Fitzpatrick said that the attorneys were referred to the Bar as a consequence of the letter. That is absolutely 100 percent false. I can produce a transcript from Judge Gettleman at the end of the very first class certification hearing when he certified the class, where he specifically said, well, this is great, I'm glad you cleared everything up. I didn't want anybody to have any trouble with the Bar. Those are almost exact quotes, your Honor. So, Mr. Fitzpatrick, you're playing a little too fast and loose there.

Mr. Fitzpatrick says that I have no class action experience. The CV that was submitted did not have a lot of my background. The fact of the matter is that I have 15 years of class action experience. I also have less hair than any of the attorneys in the room. I have lots of class action experience, your Honor. Mr. Milstein, he is one of the most experienced counsel in the whole area. We are absolutely adequate and equipped to take these cases to trial. We have tried the *CE vs. Cy's Crabhouse* case. After two days of trial, that class -- that case was settled in favor of the class. We have won summary judgments, your Honor.

Mr. Fitzpatrick -- this is a light switch case, your Honor. And that is the reason why we have been attacked by

the defendant so vigorously in this case is because if we go away, then the case goes away and it's pretty much that simple.

In the model Rules of Professional Conduct, your Honor, if you go to the ABA, the Preamble, Section 20, it's very instructive. It states --

THE COURT: Section 20?

MR. LEWIS: Yes, of the Preamble of the ABA Rules of Professional Conduct, the model rules. It states, "Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." It goes on, "The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies, they are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment or for sanctioning a lawyer under the administration of a disciplinary authority does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule."

You've heard a lot today about what the defendant believes was misconduct by Mr. Kelly and the Anderson & Wanca firm, but we have submitted at least eight cases now, your

Honor, where all of these issues have come up after the Seventh Circuit decision came down last November and every single court has found that there was no misconduct. The misconduct that Ms. Abraham has cited and defense cites in this case, Judge Gettleman in the *Creative vs. Ashford* case on remand termed those allegations as "pure sophistry."

The computer data that is at issue in this case was produced by the Abrahams' attorney, it was produced by Joel Abraham after he was under force of subpoena under a records and deposition subpoena.

The defendant has made much here about the use of the term "receipt," the defendant claims that the TCPA itself requires proof of receipt. That's just not true. The TCPA itself -- the language of the TCPA uses the word "send," it does not use the term "receipt." The Georgia Supreme Court just a couple weeks ago came down in an opinion, that we can provide to the Court, that couldn't make it more clear that the issue is whether a fax was sent, not received.

The advertisement in this case did come from the hard drive, your Honor, it was attached to the Biggerstaff opinion, it was attached to the complaint. We're not -- we have never said that the advertisement that defense counsel was showing your Honor just earlier was the actual original fax. Everybody throws away these faxes, that's why it's termed the Junk Fax Protection Act, that's why everybody calls them junk

faxes, that's why Congress made the law that is the reason why we're here today, so any misconduct that is trying to be attributed to us with regard to that is just wrong.

The fact that there isn't a fax header, I can't tell you right off the top of my head because the experts or at least our expert is able to determine this. But there was a time when Ms. Abraham actually had her computers programmed so that no fax header would appear. So Mr. Fitzpatrick's assertion that there is always a fax header is not true, junk faxers are wily, they're crafty, and they can make computers do things to fax machines. But it really doesn't matter because the advertisement, again, from this case on behalf of City Select did come from the hard drive.

THE COURT: Well, is that fax, the fax that's in the record, a replica what's on the hard drive?

MR. LEWIS: Exact replica, your Honor.

THE COURT: So what's on the hard drive, I guess you wouldn't expect would have a fax header, would it?

MR. LEWIS: Exactly, your Honor, it would not.

THE COURT: So if I were to take a copy of one of my opinions and decide to fax it to somebody, what I retain doesn't have a fax header on it, I retain my opinion whether it's in our computer or whatever.

MR. LEWIS: That's exactly right.

THE COURT: I didn't have doubt about it before, but

you're now making it crystal clear that that fax that's attached to the complaint and that's referred to throughout the matter is not a copy of what the plaintiff is saying he received, it's a copy of what the plaintiff is saying or that you're saying on behalf of the plaintiff that the defendant through its agent sent.

MR. LEWIS: Absolutely, your Honor. And the plaintiff, vis-a-vis that proof, can prove the entire case for everyone else. There may not be a soul on earth that still has one of those 44,000 plus junk faxes that were sent in this case, that's how these cases work. Congress did not use the term receipt possibly for that reason.

THE COURT: Well, have you met with or someone in your firm met with City Select?

MR. LEWIS: I have not, your Honor.

THE COURT: Do you know what City Select would say through their 30(b)(6) witness about whether they, you know, received this fax, whether they had a business relationship, and all that sort of thing?

MR. LEWIS: I personally do not, your Honor.

THE COURT: So how can plaintiff prove this?

MR. LEWIS: It is possible that City Select has the fax because we have had other cases where they have had the fax. *Chapman vs. Wagner*, Mr. Chapman was a pack rat, he kept everything, we had the fax. There have been some cases where

the actual received fax has been produced. But most of the B2B cases, that's not the case, all of the proof is straight through. *CE vs. Cy's Crabhouse*.

THE COURT: Fax machines, in my experience, keep a record of how many pages came in and what transmission on what date and that can go back for that months, if not years. Have you inquired of your client whether they have a record of this sort of transaction being received?

MR. LEWIS: Most fax machines do not retain that data unless they have a computer chip, as I understand the technology. We have experts who are far more well versed in these matters than I, but most fax machines you just get the fax and that's it. But you don't need any of that evidence. We have certified over, I think, 10, 11, 12 of these B2B cases in federal courts. We've certified another 13 or so, somewhere between 20 and 25 of these B2B have been certified, almost all of them have been certified based on the evidence that we have brought to your Honor. The other -- these opinions are very persuasive. Mr. Fitzpatrick makes it sound like it would be this great unjust thing that nobody's ever seen before, that this is a clear outlier, but all these cases have been certified basically on this exact type evidence that we've produced to you.

Mr. Fitzpatrick never --

THE COURT: Well, I'm I think what that

Mr. Fitzpatrick is fundamentally arguing is that there's a plaintiff who's indifferent to this cause of action, who didn't come to you, didn't know whether he was actually harmed by this, whether he actually received anything, and was solicited in a questionable manner by an out-of-state attorney, and there's a dispute about whether this was mere advertising material or whether it was a pitch, it says on the bottom of the letter "advertising material." So maybe there are issues presented here that ought to be looked into.

MR. LEWIS: Your Honor, it's actually very common in the class action context, and I will give you a couple of examples.

THE COURT: I've been doing them for almost 30 years so I have an idea what's out there. And I don't remember this kind of an issue being raised in any case where there was a real concern that there was an improper solicitation and there's not a real plaintiff. I did have one fairly recently where the plaintiff seems to have signed up a lawyer to bring up a class action case before the plaintiff made the purchase which was the subject of the class action and then claimed to be defrauded in the making of the purchase, I have seen that. But --

MR. LEWIS: Professor Newberg has noted that attacks on counsel are becoming more and more prevalent in the class action context, and maybe you're seeing that as well.

THE COURT: Well, certainly I see a lot of things.

MR. LEWIS: I've got a couple more things I have to address, your Honor.

THE COURT: What I'm wondering is this, I would rather not certify a class if the plaintiff couldn't survive a summary judgment motion one day, and I'm wondering if this is a case where the class certification should be dismissed without prejudice and that the case would go forward with the discovery of what happened with City Select and how suitable they are to be a class representative, and also some of these other unanswered questions about the admissibility of the evidence that something was sent to City Select. If those questions, and they may just be hobgoblins, you may be right, but if they're clarified, then I think you have a very easy path to victory. If they're not clarified, then we're going to go through this whole class certification, I'll sign a class certification order, let's say, notice goes out to everybody, a lot of expense and everything, and then it turns out that the case implodes on City Select.

MR. LEWIS: So are you suggesting --

THE COURT: I'm asking the question, I haven't made up my mind, but I'm wondering if this is premature and issues like the deposition of City Select, the deposition of Ryan Kelly, the deposition of Mr. Abraham and his mother Mrs. Abraham, that would be necessary, it seems, to prepare

for trial, whether those ought to be done now as preparation for the renewed class certification motion.

Any thoughts?

MR. LEWIS: We believe that the papers we have submitted are sufficient, but we are fully capable and willing to do whatever your Honor requests.

THE COURT: Are you also familiar with cases where class cert have been deferred until some sort of underlying discovery has been taken?

MR. LEWIS: That happens on occasion.

THE COURT: And this case, I'm sorry it's so old, the last six months are on my watch, it's taken a while to get this case to oral argument. But I am surprised that there hasn't been more exchange outside of the class certification motion, in other words, the taking at least of some sort of class certification discovery by the defendant of the plaintiff. That's one thing that makes me reluctant to stop the clock and give the defendant, you know, some more months on top of the six or nine months that have already existed to gather the evidence.

MR. LEWIS: I have a couple more points I need to address.

THE COURT: Please.

MR. LEWIS: The allegations about the $5,000 check, again, we have the opinion of Professor Painter who literally

wrote the book on legal ethics, they have not come up with any countervailing rebuttal opinion. Numerous courts have studied this issue, have looked over the facts and circumstances regarding the $5,000 check, and nobody has come to the conclusion, no court has come to the conclusion that we did anything wrong.

THE COURT: Do you know what the --

MR. LEWIS: Judge Kennelly reviewed it in the *CE vs. Cy's Crabhouse* case initially. I'm sorry, your Honor.

THE COURT: What was the intention behind the $5,000 check?

MR. LEWIS: Well, the words on the bottom of the check in the memo section were "document retrieval." We had been going through this process with Caroline Abraham in numerous cases and both Mr. Wanca and Mr. Kelly submitted affidavits, for example, to the court in the *CE vs. Cy's Crabhouse* case in front of Judge Kennelly, which we can supply to your Honor, but it was about document retrieval. The ethical rules, when you're dealing with third parties, require that attorneys deal with them fairly and honestly and don't make their lives so burdensome or overly tax them, that they have a right to their reasonable expenses and the costs and time incurred in retrieving documents. Ms. Abraham, in addition to, aside from all of the computer hard drive issues that we talked about today, she also has another set of

documents that she, and computer records that she still has at her house, so it takes time for her to retrieve all those records and submit them, sometimes defendants, sometimes us, but in that context -- both her and Joel for a period of time were receiving checks somewhere between 50 and $100 apiece, and in that context and in the context of there being many more subpoenas coming down the pike and many more cases that were going to be litigated, Mr. Wanca sent a check to Ms. Abraham's attorney Mr. Rubin. Mr. Rubin, of course, was also Ms. Abraham's attorney when she was battling the FTC when she had been accused and ultimately settled, she was the mastermind along with her husband of the largest illegal diploma selling scheme in the history of the world and illegal driver's license scheme. And after the FTC shut her down for those matters, she immediately started junk fax broadcasting, violating our nation's laws doing that. So Mr. Rubin was her attorney during those matters. And now -- well, up to that point Mr. Rubin became her representative with regard to some of the goings on with regard to the junk fax litigation. So that's the general context of the $5,000 check. Judge Kennelly has reviewed it. Judge Callahan in *Reliable vs. McKnight* has reviewed it. We've given you citations to all these cases, court, after court, after court, after court.

THE COURT: But if Mr. Rubin himself was offended by it, doesn't that say something?

MR. LEWIS: Well, yeah, in the context of Mr. Rubin was her criminal defense attorney, and Mr. Rubin had quite a few different axes to grind himself. In fact our Professor Painter, our expert, specifically said that for, I'm quoting from Document 36-1, Page 11 of Professor Painter's opinion, "For an attorney receiving such a payment to accuse the sending attorney of offering a bribe or other improper payment is an unprofessional delay tactic to avoid complying with discovery requests." Professor Painter issues -- states many other things that explains why this was perfectly appropriate, there was nothing improper about it.

Earlier the defendant's counsel stated that there was some sort of connection between the $5,000 check and the December 28, 2010, declaration, that's absolutely false. There's no -- this check was in June of 2009, the declaration was a year and a half later after we had innumerable disputes in federal courts and state courts around the nation with Ms. Abraham. There has been an adversarial relationship throughout. She's stated over and over again she's on the side of the defendants. She's a hostile witness. I mean, she doesn't like to be brought in as a third party in these cases.

THE COURT: Well, was there -- did Mr. Milstein file opposition to a motion to default the third-party defendants?

MR. LEWIS: There's a perfectly reasonable explanation for that. We did it in *Cy's Crabhouse*, we've done

it in other cases, we're trying to protect the class, to move things along. These third-party cases against Ms. Abraham, according to Ms. Abraham, she's penniless. Nobody has ever produced any evidence that she has even more than a 2004 Ford Taurus. Now, the government had some very -- were very skeptical about that and in the context of their agreement to settle the illegal driver's license case and the illegal diploma scheme that she was perpetrating, they put in, I think, a five or $10 million avalanche clause into the case so if the government ever learns that she has any money and has any assets, then they can come and get it, vis-a-vis that avalanche clause.

THE COURT: Why not let her default so it doesn't clutter the pleadings?

MR. LEWIS: I don't have any problem with defaulting.

THE COURT: But you're opposed.

MR. LEWIS: We opposed it before because it was slowing the case down. But if she defaults now, there's no slowing the case down. What's done is done, she's defaulted. It doesn't hurt the class, it's done, I have no objection to it.

THE COURT: Okay.

MR. LEWIS: One final thing about the *Landsman vs. Funk* case and defense counsel's wanting this Court to follow New Jersey state law and throw the federal rules out the

window. There were also tens of thousands, I don't know the exact number, but thousands and thousands of class members in Pennsylvania, so the people in Pennsylvania are supposed to be subject to New Jersey law in federal court? The argument makes no sense.

THE COURT: Well, would the Court apply New Jersey's choice of law as law and determine who's covered by what?

MR. LEWIS: No, our opinion -- our view, and the case law supports this, is that the Federal Telephone Consumer Protection Act in federal court, the federal procedural rules and the federal substantive rules are applied in federal court.

THE COURT: But what do you make of the section of the TCPA, Section 227(b)(3) that the Third Circuit was dealing with, that there's a condition placed upon the TCPA that it be, if otherwise permitted by laws or rules of court of a state, that language is in the federal statute, so how is that to be applied in our case?

MR. LEWIS: It's to be applied in the same way the statute of limitations, the four year statute of limitations is applied, the federal four-year statute is applied, not any type of state statute of limitations. We can brief this as Mr. Fitzpatrick requested.

THE COURT: Okay. You can review your notes for a minute and I need to just confer.

MR. LEWIS: Yes, your Honor.

THE COURT: We need to take about a ten or 15-minute break. Before I ask for supplemental briefing, I want to see if I can track down this *Landsman & Funk* issue. We're aware of the case but not aware of the interpretation that is being placed on it. Is Mr. Fitzpatrick arguing that the case requires compliance with state classification precedents?

MR. FITZPATRICK: Yes, sir, I believe that's the only possible reading of the court's remand with specific instructions to the district court to examine whether it subjects such actions to state law limitations that would apply to similar suits filed in state court, I believe that's why that did it. And New Jersey is different from all the states that plaintiff's counsel cited. New Jersey has specifically held that this -- the TCPA does not permit class action treatment under New Jersey law. And that's why I think the district court made this clear, because the statute itself has this "if otherwise permitted by laws or rules of a court of a state," and that analysis necessarily leads this Court, I believe, to conclude, well, this case was brought in New Jersey and, under the TCPA, and the Third Circuit requires us to make this analysis, we look to state law. State law is specific on this, it has addressed the issue, it says these cases are not appropriate, therefore, we don't have a basis for applying for permitting it to be handled as a class action

matter in this court. I think it emits of no other reading.

THE COURT: And, Mr. Lewis, anything else before we take a short break?

MR. LEWIS: No, your Honor.

THE COURT: Let's take a break until about 3:20 and then we'll resume.

MR. FITZPATRICK: Thank you, sir.

(Brief Recess.)

DEPUTY CLERK: All rise.

THE COURT: Okay. Be seated, please.

Thanks for your patience. I wanted to take that time to revisit the Third Circuit's decision in its remand of *Landsman & Funk*, and this is a development that occurred while the briefing of this motion was underway but hasn't been addressed by the plaintiff. The issue in *Landsman & Funk*, which was remanded to Judge Hayden and which she, to my knowledge, has not yet addressed other than in a motion that denied consolidation of similar cases, is the issue raised by the private right of action statute that gives rise to jurisdiction as interpreted by the *Mims* decision of the Supreme Court, and that section is 47, United States Code, Section 227(b)(3)(B), and that reads: "Private Right of Cause of Action. A person or entity may, if otherwise permitted by the laws or rules of court of a state, bring in an appropriate court of that State," dropping down to B, "an action to

recover for actual monetary loss from such a violation or to receive $500 in damages for each such violation, whichever is greater."

And the question remanded, as identified by the Third Circuit, is whether the TCPA subjects class actions that are filed in federal court to the laws and court rules of the state in which they're filed and, if so, which ones. And that apparently is due to the gloss that the federal court, including the Supreme Court, have placed on the jurisdictional statute which permits the bringing of a TCPA case in state court but is silent as being able to bring it in federal court.

I'm uncomfortable going ahead with this class certification motion at the present time. I'm going to dismiss it without prejudice to its renewal. I want to give the parties time to do two things; first, to complete discovery that would shed light upon the class action or the class certification issues that have arisen during this briefing, especially the adequacy of the named plaintiff, the class representative and, secondly, as to the admissibility of what should be the key piece of evidence in the case, which is the computer data, but, most importantly, to determine whether this Court has to apply state class action law in determining whether this case should be certified.

This may be a unique issue in light of all the federal

courts that have certified such classes, but it does come after the Third Circuit's remand in a case that appears to be on point in raising these questions. And New Jersey law has only three decisions that I've been able to find so far that address whether a class action can be maintained or at least whether this particular class action in those cases could be maintained for the violation of this type under the TCPA. And, of course, the one which is quite persuasive is Judge Carchman's case on behalf of the Appellate Division in *Local Baking Products, Inc., vs. Kosher Bagel Munch, Inc.*, 421 N.J. Super. 268, decided by the App. Div. on July 19, 2011, Cert. was denied by the New Jersey Supreme Court in September of 2011. And Judge Carchman cites to unreported decisions that had reached similar conclusions about the non-certifiability of a TCPA class of this sort because of the issues of superiority and I think it was predominance, and that had to do with the need to determine, in his view, or rather in the panel's view, the consent or lack of consent of each recipient.

If I'm bound by that, it may be dispositive of the ability ever to certify a class in this case. If I'm not bound by it but I'm to apply Rule 23 and federal procedural law, then I think that the plaintiffs have presented a fair question that requires my adjudication just like any other class certification motion does. And, frankly, until the

importance of the *Landsman & Funk* case was brought to my attention this afternoon, I was probably leaning more toward granting certification but now I can't. And I think that the better thing is to start over, to have a short period of discovery, which I'm capping at 60 days, and it will be up to the parties to work out a plan for reasonable discovery in aid of class certification. I'm really interested in getting at what this plaintiff did, what they knew, what records they have, what their purpose is in seeking to be the class representative, in other words, typical class representative discovery because ultimately I need to determine if the plaintiff is a suitable class representative whether it's under federal law or state law.

So I'm, frankly, a little disappointed, an awful lot of work has gone into this already. I know you're disappointed, you've waited a long time for today for a decision, but I'd rather make the right decision than the wrong one. But you're not going to have to necessarily refile everything that you've filed already, you can make reference to it in your future briefing. I'm not trying to make your work more difficult but it gives you a chance, and the plaintiff has the burden, to establish what the law is to be applied and to apply it in a way that persuades the Court to certify the class. And if that can be done, we'll have a certified class; if it can't, then we won't.

Are there any questions about what I've said so far?

MR. LEWIS: Yes, your Honor.

THE COURT: Okay.

MR. LEWIS: Would you like the *Landsman* briefing, I guess what I will call the *Landsman* briefing to begin immediately?

THE COURT: Would that be helpful to the parties or would you rather wait until you see how your discovery pans out?

MR. LEWIS: We think the law is pretty clear, you may file it in state court but that doesn't preclude filing it in federal court. And we believe that the TCPA, federal TCPA applies not state law procedure rules, we don't.

THE COURT: Why would the Third Circuit then have remanded on that issue? I mean, it's clear that a TCPA can be filed in federal court. If I'm reading the *en banc* remand properly, the Third Circuit wasn't prepared to decide what rules apply or what law even applies beyond the TCPA. So there might be two hurdles to jump through statutorily, one is what's in the TCPA and the other is whatever is in state law, including the court rules that would color the right to maintain such an action. And perhaps if one gets through both hoops, then you have a successful federal court suit. But it's something that I want to give the parties an opportunity to brief.

If state law were more permissive of this sort of class action, then this would be an interesting question but not a show stopper. But what I'm seeing under New Jersey state court decisions is that this sort of class action is either strongly disfavored because of the problems identified in Judge Carchman's opinion or even prohibited.

MR. LEWIS: I don't know if *Landsman*, your Honor, applied to persons in one state or in multiple states. In this case we've got persons in, at a minimum in Philadelphia, in Pennsylvania and New Jersey, at least two states are implicated, maybe more, so that might be a differentiating factor.

But putting that aside, it's plaintiff's position that we should start the briefing -- we would like to start the briefing, your Honor, now and we could do an opening class brief on this issue -- an opening brief rather on this issue and he could have time to respond and we could have time to reply.

THE COURT: I think that makes sense.

Mr. Fitzpatrick, what I'm considering is this, that the pending motion be dismissed without prejudice, that plaintiffs would have whatever time they need, maybe 30 days to file an opening brief for class certification accompanied by their views of the *Landsman* issue and how it should play out. You would then have additional time, more than the normal time

before your opposition is due, maybe another 60 days from then, and that would give you the time to take whatever discovery is reasonable and relate it to the class certification issues and brief the new issues, at least to me they're new issues, plus anything else that comes up along the way at class certification, then the reply could be due 15 days after that or something. And we could schedule for another argument, and it would probably be around April we would be ready for that argument, and I can put that in the Order that results from today's hearing.

Does that make sense?

MR. FITZPATRICK: Yes, I think that's reasonable, your Honor, and I'm in agreement with that.

MR. MILSTEIN: Do we know what the judge is going to do on remand, is there something pending?

THE COURT: Yes, it was remanded to Judge Hayden and the first issue that she confronted is whether seven different cases should be consolidated, and she wrote an opinion that denied consolidation. I could give you the cite, I think, if I can find it.

MR. LEWIS: We can get to it.

MR. MILSTEIN: I can get it. I was wondering if there was a motion pending right now that we're waiting on.

THE COURT: I don't know, you can check the PACER docket.

MR. MILSTEIN: Okay.

THE COURT: It had been briefed, it does mention that. This opinion that I'm looking at after the remand came out on June 22nd and that opinion says that the parties were briefing the issue at that time. So I'm sure briefing is concluded, there could even be a decision. Her decision wouldn't -- it would be persuasive but it wouldn't be binding here on a fellow judge in any event. But I think that, coupled with my need to know more to assure the adequacy of the plaintiff itself would be helpful.

Anything else before we adjourn?

MR. LEWIS: With regard to the admissibility of the computer data issues, what are the parameters there? We certainly don't want a situation where counsel decides that he wants to take 15 depositions. I mean, are you talking about deposition of Caroline Abraham only?

MR. FITZPATRICK: No way. I want to take the deposition of Brian Wanca, Ryan Kelly, and Caroline Abraham and Joel Abraham, who he represented to you this afternoon is the actual source of the data, and others, I may have others as well. But I don't see this as limiting me in what I'm required to do at this point and I don't see the basis for any preliminary limitation.

THE COURT: I think that's reasonable, the four that you mentioned. Maybe you don't need them all but maybe you do

and maybe you need others, but I'll leave that to you. And I'll ask counsel to cooperate so that it becomes easier to serve the deponents and get their depositions done. Hopefully there won't be problems in getting that done. And it's not an idle exercise, if the class is certified, then I think that sort of discovery goes a long toward the merits itself and it would be useful. And by the same token the defendant would be permitted to convene the deposition of the designated class representative if you choose to, I'm not requiring these things but I'm giving you an opportunity.

MR. FITZPATRICK: I forgot to mention him, but that's obvious, I certainly want City Select.

THE COURT: I'll enter an Order. The reasons for the Order I've explained just now on the record as best I can, there won't be a written Opinion, but I will track through in my Order the steps that I'm asking counsel to take and the time line for doing it.

MR. LEWIS: Okay.

THE COURT: And you should see that on the docket on Monday morning. Okay? So thank you, everybody.

MR. FITZPATRICK: Thank you, your Honor.

MR. LEWIS: Thank you.

(Proceedings Concluded)

C E R T I F I C A T E

I, LISA MARCUS, Official Court Reporter for the United States District Court for the District of New Jersey, Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes to the best of my ability of the matter hereinbefore set forth.

S/Lisa Marcus, CSR
LISA MARCUS
Official U. S. Reporter
N.J. Certificate No. XIO1492

DATE: January 14, 2013

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